No. 83-1148

In the Supreme Court of the United States

OCTOBER TERM, 1983

LEO VITTORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
BRUCE R. ELLISEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for willfully subscribing to false tax returns in violation of 26 U.S.C. 7206(1).

2. Whether the court of appeals applied the correct standard in concluding that exclusion of certain defense testimony would constitute harmless error.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Chapman v. *California*, 386 U.S. 18 ..... 6, 7

Hoover v. *United States*, 358 F.2d 87, cert. denied, 385 U.S. 822 5

Hughes v. *Mathews*, 576 F.2d 1250, cert. dismissed, 439 U.S. 801 7

Kotteakos v. *United States*, 328 U.S. 750 ..... 3, 6, 7

Sinclair v. *United States*, 279 U.S. 263 4

United States v. *DiVarco*, 484 F.2d 670, cert. denied, 415 U.S. 916 4

United States v. *Gibson*, 675 F.2d 825, cert. denied, 459 U.S. 972 7

United States v. *Halbert*, 640 F.2d 1000 6

United States v. *Haynes*, 573 F.2d 236, cert. denied, 439 U.S. 850 5

United States v. *Kostoff*, 585 F.2d 378 6

United States v. *Lay*, 644 F.2d 1087, cert. denied, 454 U.S. 869 7

United States v. *Lechoco*, 542 F.2d 84 7

Page

Cases—Continued:

United States v. *Null*, 415 F.2d 1178 5

United States v. *Romanow*, 509 F.2d 26 5

United States v. *Strand*, 617 F.2d 571, cert. denied, 449 U.S. 841 5

United States v. *Taylor*, 574 F.2d 232, cert. denied, 439 U.S. 893 5

United States v. *Valdez*, 594 F.2d 725 6

United States v. *Whyte*, 699 F.2d 375 5

Winship, In re, 397 U.S. 358 4

Constitution and statutes:

U.S. Const.:

Amend. V 6

Amend. VI 6

Internal Revenue Code of 1954, 26 U.S.C. 7206(1) 2, 3, 4, 5

18 U.S.C. 371 1

18 U.S.C. 1341 1

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1148

LEO VITTORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A19-A38) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A18) was entered on August 12, 1983. A petition for rehearing was denied on October 14, 1983 (Pet. App. A39). The petition for a writ of certiorari was filed on January 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to defraud the Internal Revenue Service in collection of taxes, in violation of 18 U.S.C. 371 and 1341 (Count 1), and of willfully subscribing to false tax

returns for the years 1974, 1975, 1976, and 1977, in violation of 26 U.S.C. 7206(1) (Counts 2 through 5). Petitioner was sentenced to 18 months' imprisonment on Count 1. He was fined $5,000 and placed on probation for concurrent five-year terms on each of Counts 2 through 5.

1. The evidence at trial showed that petitioner was a member of a cement masons' union in which it allegedly was common practice for unemployed masons to work in the names of other masons (referred to as "stiffs") who were union members but who were not then working in masonry. The mason who used the stiff's name received tax-free income, and the stiff received pension credits and health and welfare benefits. Pet. App. A20. During the 1970s several masons worked in petitioner's name. Petitioner reported income actually earned by other masons on his federal income tax returns for the years 1974, 1975, 1976, and 1977 and submitted W-2 forms in his name reflecting that income. During this period petitioner was not working as a mason, but was operating a restaurant. He used deductions for losses incurred in his restaurant business to offset tax liability on the income he reported but did not actually earn. *Id.* at A20-A21, A35 n.1.

During petitioner's trial, the trial court excluded as hearsay portions of the testimony of a defense witness, Angelo Acca. In his testimony Acca described two telephone calls from petitioner in 1974 and 1975, in which petitioner allegedly indicated his concern about the W-2 forms he was receiving and asked Acca to tell "some of the men * * * to stop using his name." The trial court permitted Acca to testify that he had received telephone calls from petitioner and that Acca subsequently told other masons they should not use petitioner's name "because of the problem he was having with all the W-2 Forms coming in." However, the court excluded Acca's testimony about petitioner's direct statements to him. Pet. App. A21-A22; III Tr. 566-570. At

the close of the evidence, the trial court instructed the jury, inter alia, "that should you find a misstatement of the source of income on an income tax return, it is a material matter as contemplated by [26 U.S.C. 7206(1)]" (IV Tr. 707).

2. The court of appeals affirmed petitioner's convictions (Pet. App. A18-A38). It held (*id.* at A23-A29) that assuming it was error to exclude Acca's testimony concerning his telephone conversations with petitioner, the error would be harmless under the standard of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946), since the "judgment was not substantially swayed" as a result of exclusion of the testimony. The court of appeals also held that the prosecutor's reference to petitioner's failure to call a witness did not constitute plain error (Pet. App. A30-A32) and that petitioner's ineffective assistance of counsel claims could not be raised for the first time on direct appeal (*id.* at A32-A33). The court of appeals found no error in the jury instructions since the precedents of the former Fifth Circuit established that under Section 7206(1) materiality is a question of law for the court (Pet. App. A33-A34).

ARGUMENT

1. Petitioner contends (Pet. 9-24) that the trial court erred in instructing the jury that, as a matter of law, the false statements on his tax returns concerning income he earned were "material" within the meaning of 26 U.S.C. 7206(1). That contention lacks merit and does not warrant further review.

Section 7206(1) provides that any person who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter" shall be guilty of a felony. A false statement is

material for purposes of Section 7206(1) if the information is needed in order to assist the IRS in verifying and monitoring the reporting of income. See, *e.g.*, *United States* v. *DiVarco*, 484 F.2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

As petitioner acknowledges (Pet. 14), this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

Petitioner contends (Pet. 10-16) that more recent cases decided by this Court require abandonment of the traditional rule that materiality is a question of law to be decided by the court. But the cases he cites hold only that a jury must decide all questions of fact; they do not suggest that a jury also should decide questions of law. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970) (prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime * * * charged").

The court of appeals' holding that materiality under Section 7206(1) is a question of law for the court is consistent with the law in all circuits that have considered the question. See *United States* v. *Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States* v. *Strand*, 617 F.2d 571, 573-574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States* v. *Taylor*, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *Hoover* v. *United States*, 358 F.2d 87, 89 (5th Cir.), cert. denied, 385 U.S. 822 (1966).[1]

Petitioner contends (Pet. 20-24) that the decision below conflicts with decisions from several circuits holding that materiality of false statements is a question for the jury. But the cases he cites involve statutes other than Section 7206(1). Thus, this case presents no conflict that requires the attention of this Court. Moreover, in the cases petitioner cites the courts have declined to overturn convictions on the ground that the issue of materiality was not submitted to the jury. For example, the Ninth Circuit has held in

---

[1] *United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969), relied on by petitioner (Pet. 19), is not to the contrary. In *Null*, the court of appeals rejected a defense contention that the jury should have been permitted to resolve the question whether the amounts the defendant failed to report were de minimis. The court of appeals noted that the trial court had instructed the jury that it had to find, inter alia, that one of four items of income was omitted from the return and that it was a material item. The court of appeals then stated that the test of materiality was whether a particular item must be reported for the taxpayer to estimate and compute his tax correctly and that "[t]his issue was properly submitted to the jury" (*ibid.* (emphasis in original)). It is apparent that the court was not addressing whether materiality is a question of law or of fact. Rather, the court was simply rejecting the defendant's contention that the relative sizes of the omitted items were relevant and, in doing so, declared that the standard for materiality on which the jury was instructed was the proper one. Cf. *United States* v. *Haynes*, 573 F.2d 236, 240 n.4. (5th Cir.), cert. denied, 439 U.S. 830 (1978) (stating that the court in *Null* did not address the issue of whether materiality is a question of law).

several cases that the trial court erred in failing to submit the question of materiality to the jury, but nevertheless affirmed the convictions because it was clear that the statements at issue were material. See *United States* v. *Halbert*, 640 F.2d 1000, 1007-1008 (9th Cir. 1981); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States* v. *Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978). Here the jury instructions did no more than state the unavoidable conclusion that false statements about the amount and source of a taxpayer's income are material because they will affect the ability of the IRS to verify and monitor the reporting of income. Thus, the materiality of petitioner's false statements was beyond dispute, and there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks.

2. Petitioner also contends (Pet. 24-30) that any erroneous exclusion of defense evidence would violate his Fifth and Sixth Amendment rights to present a defense; he claims that the court of appeals therefore should have applied the "harmless beyond a reasonable doubt" standard for constitutional errors, established by *Chapman* v. *California*, 386 U.S. 18, 24 (1967), rather than the harmless error standard of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946) — *i.e.*, whether the judgment was "substantially swayed by the error" — in reviewing the allegedly improper exclusion of Acca's testimony about the telephone conversations. That contention is without merit.

The court of appeals correctly noted (Pet. App. A37 n.4) that extension of the *Chapman* standard for constitutional error to this case "would be to apply it to every erroneous evidentiary ruling." Such a rule would be clearly inappropriate. Petitioner cites (Pet. 28-29) several cases in which courts have applied the *Chapman* standard to erroneous exclusion of defense evidence. But those courts merely applied the standard without discussing whether they were

required to apply the *Chapman* standard rather than the *Kotteakos* standard in such cases. See *United States* v. *Gibson*, 675 F.2d 825, 834 (6th Cir.), cert. denied, 459 U.S. 972 (1982); *United States* v. *Lay*, 644 F.2d 1087, 1090-1091 (5th Cir.), cert. denied, 454 U.S. 869 (1981); *Hughes* v. *Mathews*, 576 F.2d 1250, 1259 (7th Cir.), cert. dismissed, 439 U.S. 801 (1978); *United States* v. *Lechoco*, 542 F.2d 84, 88-89 (D.C. Cir. 1976). It can hardly be said that the question "has generated severe conflict and confusion among the circuits" (Pet. 30).

In any event, assuming arguendo that the trial court erred in excluding Acca's testimony, that error would be harmless under the *Chapman* as well as the *Kotteakos* standard. The court of appeals correctly noted (Pet. App. A25-A26) that the excluded testimony had "no bearing" on the charges of filing false tax returns, because uncontradicted evidence showed that even after the telephone calls petitioner intentionally filed tax returns reporting income that he knew was not his. The court also concluded correctly (*id.* at A36 n.4) that the excluded testimony was "only tangentially relevant, if at all" to the dispositive issues under the conspiracy count — the existence of an agreement and overt acts in furtherance of the agreement. The jury had before it evidence of petitioner's willful filing of false returns and his knowledge of whom to contact to stop the flow of W-2 forms, as well as his wife's testimony that they were aware his name was being used and that they did not try to stop the practice because it would have caused trouble for many people. The court of appeals noted (*id.* at A27-A28) that in light of this evidence it "borders on the ridiculous" to suggest that the jury would have entertained any "otherwise nonexistent reasonable doubt" about petitioner's participation in the conspiracy if Acca's testimony had been admitted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
BRUCE R. ELLISEN
Attorneys

MARCH 1984

DOJ-1984-03

(THIS PAGE INTENTIONALLY LEFT BLANK)